

CERCLA Liability and the *Small Business Liability Relief and Brownfields Revitalization Act*

On January 11, 2002, President George W. Bush signed into law the *Small Business Liability Relief and Brownfields Revitalization Act*. The Brownfields Law expands potential federal financial assistance for brownfields revitalization, including grants for assessment, cleanup, and job training. The new law also limits the liability of certain contiguous property owners and prospective purchasers of brownfields properties, and clarifies innocent landowner defenses to encourage revitalization and reuse of brownfields sites. The Brownfields Law also includes provisions to establish and enhance state and tribal response programs, which will continue to play a critical role in the successful cleanup and revitalization of brownfields.

This summary highlights CERCLA liability and liability provisions of the new law.

Title I - Small Business Liability Protection

The new Brownfields Law provides liability protection for certain de micromis and municipal waste contributors to NPL sites. It:

- Exempts from CERCLA response cost liability certain small volume waste contributors to NPL sites (i.e., contributors of less than 110 gallons or 200 pounds), if waste has not contributed significantly to cost of response action.
- Exempts from CERCLA response cost liability certain contributors of municipal solid waste (MSW)(e.g., certain residential property owners, small businesses, non-profits), if MSW has not contributed significantly to cost of response action.
- Shifts court costs and attorneys fees to a private party if a private party loses a Superfund contribution action against de micromis or municipal solid waste exempt party.

EPA anticipates issuing **guidance related to the de micromis and MSW exemptions** towards the end of 2002.

Title II - Brownfields Revitalization and Environmental Restoration – Subtitle B

The new Brownfields Law provides that, under certain circumstances, simply owning contaminated property does not result in CERCLA liability. The law clarifies Superfund liability for:

- Contiguous Property Owners
- Bona Fide Prospective Purchasers
- Innocent Landowners.

Contiguous Property Owners: exempts from CERCLA liability owners of property contaminated by a contiguous property, if the owner:

- S is not otherwise liable for the contamination and is not affiliated with a liable party
- S takes reasonable steps with respect to hazardous substances on the property, cooperates and provides

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assistance and site access, complies with land use controls, site information requests, and legal notice requirements

- S conducts “all appropriate inquiry” prior to purchase and demonstrates it did not know or have reason to know of contamination.

Bona Fide Prospective Purchasers: For purchasers buying contaminated property after date of enactment, potential CERCLA liability is limited to a “windfall lien” for the increase in value of the property attributable to EPA’s response action, provided the purchaser:

- S is not otherwise liable for the contamination and is not affiliated with a liable party
- S does not impede cleanup, exercises appropriate care by taking reasonable steps, cooperates and provides assistance and site access, complies with land use controls, site information requests, and legal notice requirements, and
- S conducts “all appropriate inquiries” prior to purchase

EPA Guidance

EPA issued guidance on its approach to implementing the Bona Fide Prospective Purchaser amendments on May 31, 2002. See, Memorandum from Barry Breen, “Bona Fide Prospective Purchasers and the New Amendments to CERCLA.” Prior to the amendment, prospective purchasers needed to enter into prospective purchaser agreements (PPAs) with EPA to address their CERCLA liability concerns. In its May 31 guidance, EPA explains that by providing a statutory liability limitation, Congress made the need for PPAs unnecessary in most instances and identified those limited circumstances where PPAs might be appropriate.

EPA is planning on issuing **guidance on implementation of the “windfall lien” provision** towards the end of 2002.

New Liability Provisions

Innocent Landowners: The new Brownfields Law amended the currently available defense to CERCLA liability for innocent landowners by clarifying “all appropriate inquiry” regarding condition of the property. The amendments exempt from CERCLA liability a property owner who:

- S is not otherwise liable for the contamination and is not affiliated with a liable party
- S exercises due care and takes reasonable steps, cooperates and provides assistance and site access, complies with land use controls, site information requests, and legal notice requirements, and
- S conducts “all appropriate inquiries” prior to purchase and demonstrates it did not know or have reason to know of contamination

EPA is currently planning on developing guidance discussing some of the conditions for the contiguous property owner, bona fide prospective purchaser, and innocent landowner exemptions from CERCLA liability (e.g., “reasonable steps/appropriate care”). EPA’s 1989 guidance on the innocent landowner is still in effect.

Reasonable Steps: The new limitations on liability for contiguous property owners, bona fide prospective purchasers, and innocent landowners require the property owners to undertake “reasonable steps,” which includes: 1) stopping any continuing releases; 2) preventing threatened future releases; and 3) preventing

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or limiting human and environmental exposure to releases.

All Appropriate Inquiry: The Brownfields Law clarifies the meaning of “all appropriate inquiry” by:

- S** Providing criteria for promulgation of federal standards
- S** Setting interim standards
- S** Requiring EPA to develop regulations establishing federal standards

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The new Brownfields Law also establishes that **site assessments carried out with the use of a brownfields grants** awarded under the authorities of subtitle A of the Act must be conducted in accordance with the “all appropriate inquiry” standards.

Interim and Future Standards

Interim Standards: Until EPA issues regulations establishing federal standards, two interim standards apply, depending on the date a property was purchased:

1. Prior to May 31, 1997 - a specific standard was not recognized, but court shall consider specialized knowledge of the defendant, relationship of purchase price to value of uncontaminated property, commonly known information, obviousness of contamination, ability of defendant to detect contamination by appropriate inspection
2. After May 31, 1997 - ASTM "Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process" (E1527-97) applies

EPA is developing a rulemaking **allowing the use of either the updated ASTM Standard, E1527-2000**, or the ASTM Standard E1527-1997, as the interim standard for properties purchased after May 31, 1997.

In the case of a **facility purchased for residential use** by a person who is not a government or commercial entity, a facility inspection and a title search satisfy the all appropriate inquiry requirement.

Future Federal Standards: The Brownfields Law directs EPA to promulgate *within 2 years* of the date of enactment regulations establishing standards and practices for satisfying the all appropriate inquiries requirements.

Title II - Brownfields Revitalization and Environmental Restoration - Subtitle C

Subtitle C: Enforcement Protection for Sites Enrolled in State Cleanup Program: The new Brownfields Law limits federal enforcement and cost recovery actions against certain persons under CERCLA sections 106 and 107 if site:

1. Meets the definition of “eligible response site” and
2. Person is conducting a response action addressing a specific release in compliance with a state response program specifically designed to protect human health and the environment